IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEL NO.636 OF 2006
WITH
CIVIL APPLICATION NO. 914 OF 2006

Allabaksha @ Bakshu Baban
Mulani since deceased, through
his LRs.
1(a) Asribi Allabaksha @ Bakshu
Baban Mulani and ors. ..Appellants

Vs.

Ibrahim Baban Mulani and ors. ..Respodents

Mr. S.G. Kudle for appellants.

CORAM: B.H. MARLAPALLE, J.
Date : July 17, 2006.

P.C.:

1. Heard Mr. Kudle the learned counsel for the appellant-defendant no.1.

2. This second appeal arises from the decree passed by the trial court and confirmed by the Lower Appellate Court for partition of immoveable properties between three brothers. The substantial questions of law have been framed as (b), (d), (g), (i) and (l) read as under:-

> (b) Whether both the Courts below have committed an error by way of not framing the

proper issue in respect of Gat No.492 for proving the fact that whether the said property was a joint family property or not and not framing the material and proper issue is the substantial question of law involved in this present Appeal?

(d) Any findings recorded without framing the issue are sustainable in law or not and this is the substantial question of law involved in the present Appeal.

(g) Misconstruction of the provisions of law is the substantial question of law involved in the present Appeal.

(i) It is pertinent to note that the Plaintiff has alleged that originally Gat No.492 was held by Baban Mulani as a tenant and when the said averment has been disputed by way of taking a plea that deceased Allabaksha Mulani was alone cultivating the said Agricultural land in his individual capacity and both the Courts below have failed to frame the substantial issue and in this regard Order 11 Rule 25 contemplates as under:-

"25. Where Appellate Court may frame issues and refer them for trial to the Court whose decree appealed from - Where the Court from whose decree the Appeal is preferred has omitted to frame or try any issue or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the Suit upon the merit, the Appellate Court may if necessary frame issue and refer the same for trial to the Court from whose decree the Appeal is preferred and in such case, shall direct such Court to take the additional evidence required.

. And such Court shall proceed to try such issues and shall return the evidence to the Appellate court together with its findings thereon and the reason therefor within such

time as may be fixed by the Appellate Court or extended by it from time to time."

In view of the abovesaid provisions of Law, the Lower Appellate Court ought to have framed the proper issues in respect of tenancy rights of Plaintiff's father, but admittedly no such issue was framed and the findings recorded in the absence of any evidence on record, are bad-in-law and in the result by way of allowed the Decree, it has resulted into miscarriage of justice.

(l) Whether both the Courts below have committed an error by way of applying the provisions of Hindu Law in respect of Plaintiff and Defendants when they are governed by the Mohamedan Law and application of the provisions of Hindu Law in the instant case has resulted into miscarriage of justice?

3. Baban Dadubhai Mulani had three sons i.e. Allabaksha @ Bakshu Baban Mulani, Dastgir Baban Mulani and Ibrahim Baban Mulani and Baban died sometimes in the year 1962. Ibrahim filed RCS No.379 of 1988 and prayed for partition of the suit property, namely, agricultural land located in Gat No.396, admeasuring 1 Hectare and 6 Ares and Gat No.492 admeasuring 4 Hectares and 24 Ares of village Degaon, Taluka Pandharpur, District Solapur as well as the house property bearing village panchayat no.16 admeasuring 9 Khan. Ibrahim claimed 1/3 shares in all these properties. The main challenge raised by the present

appellant-defendant no.1 is in respect of the agricultural land in Gat No.492 by contending that the said property was granted to him exclusively and he was in cultivation of the same as the Inamdar and the other two brothers did not have any right to claim partition in the said land. It appears that the second brother Dastgir did not support the defendant no.1 on this issue and he supported the plaintiff's contentions that all the three brothers had equal share in the Inam Land as well.

4. The trial court framed the issues based on the plaint as well as the Written Statement and more particularly whether the suit properties were ancestral and joint family properties of the three brothers and on considering the evidence, the trial court held that the suit properties were joint family properties and each brother was entitled to have 1/3 share. The decree passed by the trial court on 31/8/2001 states that plaintiff as well as defendant nos.1 and 2 have 1/3 share each in the suit properties mentioned in para 1(a) to (c). On reappreciation of evidence, the Lower Appellate Court has confirmed this

decree vide its Judgment and Order dated 28/4/2006.

5. Issue no.2 framed by the Lower Appellate Court reads as under:-

> 2. Whether the Plaintiff’s father proved that property Gat No.492 is ancestral and joint family property and is partible?

. Mr. Kudle the learned counsel for the appellants submitted that when the plaintiff’s father died in the year 1962, he would not appear before the trial court in a suit filed in 1988 and prove that the agricultural land in Gat No.492 was an ancestral and joint family property subject to partition. A certified true copy of the Lower Appellate Court’s Judgment is on record and it appears that there is a typographical mistake in adding the words "plaintiff’s father" instead of "plaintiff". This issue has to be read in conjunction with Issue No.1 framed by the trial court and thus both the courts below examined whether the plaintiff proved that all the suit properties were ancestral and joint family properties and before the Lower Appellate Court the same issue in respect of Gat No.492 was more emphatically agitated

by the appellants. Thus, the Lower Appellate Court examined whether the plaintiff proved that the land in Gat No.492 was a joint family property. The trial court on this issue has observed as under:-

> "....Originally Gat No.492 was in the name of Baban Dadubhai Mulani and Exh.184 the 7/12 extract for the year 1951-52 to 1960-61. This land is Inam Land, it is shown in the name of god "Daval Malik Pirsaheb". The statutory tenant in the other rights column Baban Dadubhai Mulani and in the possession column the name of Baban Dadubhai Mulani is shown till 1960-61. Now as per the death certificate on record Baban Dadubhai Mulani died in the year 1962. Till the death of Baban Dadubhai Mulani there was no name of the plaintiff or defendants in the 7/12 extract. Exh.141 is very material. That in the year 1986 the plaintiff had filed an application to enter his name along with defendant nos.1 and 2. That entry was cancelled only on the ground that the land is Inam Land. However, the name of defendant nos.1 and 2 and the plaintiff are shown for the 1/3rd share each. The revenue proceeding is pending between the plaintiff and defendant no.2. The decision of the Tahasildar is in favour of the plaintiff and the same is pending in an appeal before the SDO."

. The trial court on appreciation of evidence held that the entire suit property originally belonged to Baban Dadubhai Mulani and till his death in the year 1962 the revenue record in respect of the suit properties was in his name. After 1962 the property

was shown in the name of defendant no.1 Allabaksha Mulani. In his Written Statement, the defendant no.1 had claimed that his exclusive possession over the suit land and more particularly the land in Gat No.492 was for the last 40 years as there was a partition between the plaintiff and the defendants. He maintained this stand in his deposition before the trial court but in his cross-examination he could not with his stand and confirmed that prior to the demise of his father entire suit property, including the agricultural land in Gat No.492 was in his name.

6. As both the courts below have recorded concurrent findings in respect of the suit property being the joint family property, including the land in Gat No.492, the first four issues raising substantial questions of law i.e. (b), (d), (g) and (i) framed in this second appeal do not survive and, in fact, they cannot be termed as substantial questions of law and more so when the evidence has been appreciated without any error. The land in Gat No.492 was Inam Land and after it was regranted to Baban, it could not have been the exclusive property of defendant no.1. The

remaining last issue of the substantial questions of law as contended by the appellants, there is no evidence brought on record by the defendants to show that for partition of the agricultural land and other immoveable properties the succession rules in Mohameddan Law would not entitle the three brothers 1/3rd share each in the joint family property i.e. the property held by their deceased father.

7. Having considered the evidence adduced and the reasoning given by both the courts below, I am satisfied that no substantial question of law is involved in this second appeal and, therefore, it fails at the threshold. The same is hereby dismissed in limine.

8. Civil Application No.914/06 does not survive and stands disposed as such.

9. Mr. Kudle the learned counsel for the appellants prays for stay to this order. The oral application is hereby rejected.

. Certified copy is expedited.

(B.H. Marlapalle,J.)